IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 154

RONALD JAMES, et al.,

Appellants,

against

ANITA VALTIERRA, et al.,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

against

ANITA VALTIERRA, et al.,

Appellees.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

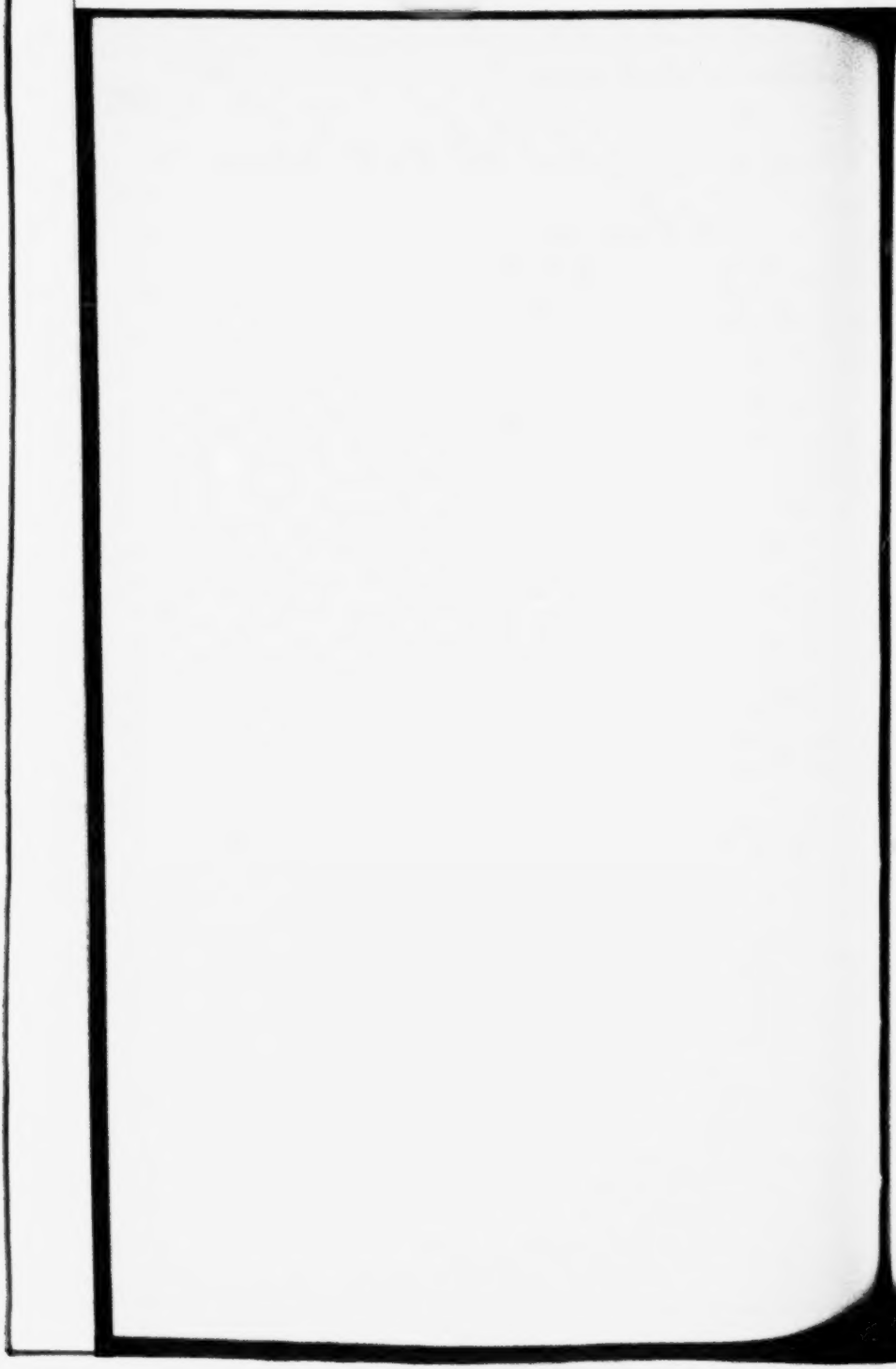
LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
Office & P. O. Address
80 Centre Street
New York, New York 10013

Telephone No. (212) 488-7421

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

GEORGE D. ZUCKERMAN
DOMINICK J. TUMINARO
LLOYD G. MILLIKEN
Assistant Attorneys General
of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570



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Interest of the *Amicus*

New York State has been a pioneer in providing both public housing and subsidized low and moderate income housing for its citizens. The New York State Division of Housing and Community Renewal administers a comprehensive program of financial and technical assistance for

local communities. In its attack upon the related problems of urban blight and inadequate housing, the State of New York provides loans, subsidies and direct grants to municipalities for urban renewal; mortgage loans and technical assistance to nonprofit and private sponsors of middle-income housing and housing for the elderly; loans and subsidies to municipal government and local public housing authorities for slum clearance and low-income public housing; and technical guidance to local government in the formulation of construction standards and in undertaking surveys to determine housing and renewal needs. See *e.g.* McKinney's Unconsolidated Laws of New York, §§ 3501-3524 and New York Private Housing Finance Law.

The State of New York maintains a capital loan fund for public housing which totaled $960 million as of March 31, 1969. As of that date, over $940 million was contracted for 140 low-rent projects containing 66,260 apartments, nearly 65,000 apartments had been completed by the end of 1969.* In addition, New York has undertaken a low rent assistance program in which the State leases or, in the instance of cooperative buildings, purchases apartments which are sublet to the poor and elderly.

New York views the outcome of this litigation involving the constitutionality of Article XXXIV of the California Constitution with more than academic interest. If this Court sustains the constitutionality of Article XXXIV, the future of public housing will be in jeopardy throughout the United States. Housing is a fundamental need and it has become increasingly clear that unsubsidized private construction cannot house the less affluent members of society. If California can require the exceptional burden of a referendum before seeking Federal assistance to house the poor, opponents of public housing in other States may be encouraged to create the same obstacle to the future development of low-income housing.

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* 1969 *New York Legislative Manual*, p. 497.

The State of New York, by its Attorney General, Louis J. Lefkowitz, accordingly files this brief as *amicus curiae* in support of affirmance pursuant to Rule 42 of the Rules of this Court.

Question Presented

Does Article XXXIV of the California Constitution violate the Equal Protection Clause of the Fourteenth Amendment in that it invidiously discriminates against the poor, Negroes and other disadvantaged minorities?

ARGUMENT

Article XXXIV of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment in that it invidiously discriminates against the poor, Negroes and other disadvantaged minorities.

Article XXXIV of the California Constitution provides:

"§ 1. Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only

there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

It should be noted that the referendum requirement of Article XXXIV is not at all a general constitutional limitation on incurring local indebtedness; if that were the case here very different issues would be presented for the Court's consideration. Here, the entire cost of the program is borne by the federal government and the tenants either through Federal loans or by federally guaranteed, tax-free bonds issued for sale by the Housing Authority. 42 U.S.C. § 1401 *et seq.* The city or county may contract with the Authority to accept "payments in lieu of taxes" to meet the cost of municipal services. 42 U.S.C., § 1410(h).

In considering the constitutionality of a governmental classification which has the effect of subjecting a group of persons to differential treatment, it is not enough to determine whether the provision in question applies equally to members of the class defined by the classification; more importantly, it must be determined "whether there is an arbitrary or invidious discrimination between those classes covered * * * and those excluded". *McLaughlin* v. *Florida*, 379 U. S. 184, 191. Moreover, certain types of classifications which are based on "suspect traits" are subjected to the "most rigid scrutiny" and can be justified only in extraordinary circumstances by state interests of the most compelling kind. See *Korematsu* v. *United States*, 323 U. S. 214,

216. Classifications based on race are "constitutionally suspect". *Bolling* v. *Sharpe*, 347 U. S. 497, 499. Classifications based on property are "traditionally disfavored". *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 668.

The classification here in question, Article XXXIV of the California Constitution is especially vulnerable to constitutional challenge because it discriminates on the basis of two "suspect" traits—property and race.

A. *Article XXXIV imposes a special burden upon the poor which deprives them of equal protection of the law.*

Article XXXIV requires that proposed public housing projects, federally financed in whole or in part, for "persons of low-income" must be first submitted to a referendum. It defines "persons of low income" in Section 1 as "persons or families who lack the amount of income which is necessary * * * to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding." The clear effect of Article XXXIV is the imposition of a special burden upon the poor who would benefit from the proposed low-rent public housing. As the three-judge District Court below stated, speaking through Judge Peckham:

> "The vice in this case is that Article XXXIV makes it more difficult for state agencies acting on behalf of the poor and the minorities to get federal assistance for housing than for state agencies acting on behalf of other groups to receive federal financial assistance. In California, state agencies may seek federal financial aid, without the burden of first submitting the proposal to referendum, for all projects except low-income housing. Some common examples, *inter alia,* are: highways, urban renewal, hospitals, colleges and universities, secondary schools, law enforcement assistance, and model cities. *Valtierra* v. *Housing Authority of City of San Jose,* 313 F. Supp. 1, 5."

The classification embodied in Article XXXIV is thus aimed at accomplishing an illegitimate legislative purpose since it seeks to exclude persons on the basis of their poverty. *Edwards* v. *California,* 314 U. S. 160; *Shapiro* v. *Thomson,* 394 U. S. 618; *Harper* v. *Virginia Board of Elections, supra; Cf. Griffin* v. *Illinois,* 351 U. S. 12.

Appellants maintain that the poor are not denied equal protection because low-income housing is the only kind of public housing in California and all the poor are treated equally with respect to such housing. But as this Court stated in *McLaughlin* v. *Florida,* 379 U. S. at 191:

> "Judicial inquiry under the Equal Protection Clause, • • • does not end with a showing of equal application among the members of a class. The courts must reach and determine the question • • • whether there is an arbitrary or invidious discrimination between those classes covered and those excluded."

The class of low-income housing must be compared with all other classes of projects for which state agencies may seek federal financial assistance without the need for a referendum. Urban renewal, colleges, and highways, for example, are projects which may benefit classes other than the poor. Such projects are free of the unique and special burdens imposed by Article XXXIV upon the poor. The poor are thus unconstitutionally deprived of an equal opportunity to secure to themselves the benefits of the federal assistance program which is designed to meet their critical need for housing.

B. *Article XXXIV invidiously discriminates against Negroes and other disadvantaged minorities.*

In addition to denying equal protection of the law to the poor, Article XXXIV invidiously discriminates against Negroes, Mexican-Americans, and other minorities since here, as in *Hunter* v. *Erickson,* 393 U. S. 385,

"the reality is that the law's impact falls on the minority." *Hunter* v. *Erickson, supra,* at 391. In the *Hunter* case this Court struck down an amendment to the Akron, Ohio, City Charter which required a referendum before the enactment of any housing anti-discrimination law, stating:

> "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U. S. at 391.

The lack of an express racial classification in Article XXXIV does not protect it from constitutional challenge. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Reitman* v. *Mulkey,* 387 U. S. 369, 373; *Gomillion* v. *Lightfoot,* 364 U. S. 339. The constitutionality of the statute must be examined not only as to its immediate objective, but also in the light of its "historical context" and its "ultimate effect." *Reitman* v. *Mulkey, Id.*

As was the case of the restrictive covenants struck down in *Shelley* v. *Kraemer,* 334 U. S. 1, and Art. I Sec. 26 of the California Constitution, recently invalidated in *Reitman* v. *Mulkey, supra* we have here still another zoning device whereby dominant interests attempt to keep neighborhoods "white". Here as in the *Reitman* case the State of California has provided private persons with the means to act upon their racial prejudices. In doing so, the State has become significantly involved in the private racial discriminations which will undoubtedly result from referenda authorized by Article XXXIV. Justice Douglas, concurring in the *Reitman* case accurately characterized proposition 14 in words equally applicable here:

> "Proposition 14 is a form of sophisticated discrimination whereby the people of California harness the

energies of private groups to do indirectly what they cannot under our decisions allow their government to do." 387 U. S. 369, at 383.

To doubt the discriminatory "ultimate effect" of Article XXXIV is to ignore past history and present realities. Widespread use of restrictive covenants played no small part in confining non-whites to certain urban areas and in contributing to general segregated housing patterns.* Real estate brokers and mortgage lenders maintained such patterns. See *Reitman* v. *Mulkey, supra,* Justice Douglas concurring at page 381. It is a present reality that:

> ". . . the right to own or lease property is already denied to many solely because of the pigment of their skin; they are, indeed, under the control of a few who determine where and how the colored people shall live and what the nature of our cities will be." *Id.* at p. 384.

Negroes, even more than poor whites, are burdened by the operation of the classification contained in Article XXXIV since they have the greatest stake in proposed low-income public housing. It is undisputed that persons of low income constitute a larger percentage of the Negro population than they do of the white population. It is also true that due to racially discriminatory attitudes there is a very limited supply of housing available to Negroes with the result that they are most often condemned to live in sub-standard and segregated housing. The President's 1967 Civil Rights Message to Congress noted:

> "The result of countless individual acts of discrimination is the spawning of urban ghettos, where housing is inferior, overcrowded and too often overpriced.

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* Hearings before the United States Commission on Civil Rights, Los Angeles, San Francisco, January 1960, p. 257.

> Statistics tell a part of the story. Throughout the nation, almost twice as many non-whites as whites occupy deteriorating or dilapidated housing. In Watts, 32.5 per cent of all housing is overcrowded, compared with 11.5 per cent for the nation as a whole."

Can it be seriously doubted that the effect of Article XXXIV is to enable the majority to express collectively the same discriminatory attitudes which have contributed to the present plight of Negroes and other disadvantaged minorities?

C. *The enjoyment of constitutional rights may not be subjected to the will of an electoral majority.*

The fact that California has enabled private persons to express their prejudices in the context of a referendum will not immunize this provision from attack. The right of Negroes to equal protection of the law is a critical personal right; a State may not abridge such rights even through the use of the majoritarian procedure of a referendum. *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 736-737. "The sovereignty of the people is itself subject to • • • constitutional limitations • • •." *Hunter* v. *Erickson*, 390 U. S. 385, 392. As this Court has stated:

> "One's right to life, liberty and property • • • and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Education* v. *Barnette*, 319 U. S. 624, 638.

Ignoring the reality of segregated housing patterns and racial prejudices existing in communities California has in effect entrusted its zoning powers to private persons and groups. Urban housing—especially low-income public housing—is in the public domain and thereby affects the State with great responsibility to insure that the public interest is served in a manner consistent with the

standards of the Equal Protection Clauses of the Fourteenth Amendment. By allowing racial discrimination to be practiced by means of the ballot box with the result that cities are zoned and maintained as white enclaves and black ghettoes, California has suffered a governmental responsibility to be exercised by private persons in a manner the State itself may not undertake to act. It is no answer to say that Article XXXIV represents the will of the majority in California, for as one of our founding fathers has stated:

> "Wherever the real power in a government lies, there is the danger of oppression. In our governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from the acts of government contrary to the sense of its constitutents, but from acts in which the government is the mere instrument of the major number of the constitutents." 5 Writings of James Madison 272 (Hunt. ed. 1904).

D. *Article XXXIV lacks real justifications for the special burdens it imposes upon the poor, Negroes and other disadvantaged minorities.*

Combining as it does an express discrimination as to "low-income persons" with a sub-surface disproportionate impact upon racial groups, Article XXXIV must surely be supported by the most substantial and compelling justifications in order to satisfy the constitutional requirements for equal protection. *McLaughlin* v. *Florida*, 379 U. S. 184 (1964). But no such compelling reasons have been established which justify California's denial to a disadvantaged minority a critically important right—equal opportunity to secure housing.

In an attempt to justify the imposition of inequalities, appellants contend that a gap in California's system of initiative and referendum resulted from a California Su-

preme Court decision which held that acts of a local governing body and housing authority relating to applications to the Federal housing authority were not "legislative" and therefore not reached by the power of referendum. (Brief of Appellants James *et al.* at pp. 13, 14; Brief of Appellant Virginia C. Shaffer at pp. 6, 7.) Therefore, they maintain, the enactment of Article XXXIV was necessary in order to return to the people of California the opportunity to actively participate in the democratic process by reserving to the people control over local matters.

But it is clear that Article 34 has done far more than merely fill in a gap in California's long standing system of initiative and referendum. If that had been the purpose of Article 34, it would have been sufficient to that end to pass a constitutional amendment expressly reserving to the people the rights inherent in the initiative and referendum with respect to decisions of local Housing Authorities to acquire federally funded low-income housing. But here as in *Hunter* v. *Erickson, supra,* the classification resulting from the amendment is not grounded in any neutral structuring of the internal governmental process. Mr. Justice Harlan concurring in *Hunter* analyzed the issues in terms that are applicable to the instant case:

> "In the case before us the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interests. * * * The city's principal argument in support of the charter amendment relies on the undisputed fact that fair housing legislation may often be expected to raise the passions of the community to their highest pitch. It was not necessary, however, to pass this amendment in order to assure that particularly sensitive

issues will ultimately be decided by the general electorate. Akron has already provided a procedure, which is grounded in neutral principle, that requires a general referendum on this issue if 10% of the voters insist. If the prospect of fair housing legislation really arouses passionate opposition, the voters will have the final say."

Hunter v. *Erickson, supra,* at 395.

Instead of placing local Housing Authority decisions in the neutral framework of California's referendum system, on the same plane as other matters presently encompassed within it, housing for the poor is classified separately and unequally. Housing for the poor is the only subject matter required to be submitted to a referendum *before* any decisions can be taken. It is the poor alone who are required to overcome this political obstacle at the *outset.* Decisions affecting publicly owned housing for students and faculty of the University of California or of the State Colleges of California are not subject to the referendum requirements of Article 34, nor is publicly owned housing connected with State hospitals and other institutions. Decisions as to public acquisition, leasing, or destruction of housing are likewise free from the burden imposed by Article 34 on housing for the poor. (See Appendix, pp. 69, 70.)

Appellant Shaffer relies upon three recent Courts of Appeals cases involving state referendum statutes: *Spaulding* v. *Blair,* 403 F. 2d 862 (4th Cir. 1968); *Ranjel* v. *City of Housing,* 417 F. 2d 321 (6th Cir. 1969), cert. denied 397 U. S. 980; *Southern Alameda Spanish Speaking Org.* v. *City of Union City, Cal.,* 424 F. 2d 291 (9th Cir. 1970). Appellant maintains that these cases are illustrations of principles which should be controlling herein (Brief of Appellant Virginia C. Shaffer pp. 58-60).

But each of these cases involved referenda which were part of *neutral, comprehensive* schemes reserving to the electorate the power to repeal or nullify an act *after* its passage *if* it exercised its option under initiative procedures.

Appellants attempt to make much of supposedly vital fiscal considerations attending any acquisition of federal funds for low-income housing (Brief of Appellant Virginia C. Shaffer, pp. 33-35). But this too rings hollow. Surely local resources must be expended to provide municipal services regardless of whether people are living in sub-standard and deteriorating housing or in decent, sanitary public housing. Indeed, it can be argued with considerable cogency that maintaining the present inadequate housing is likely to involve greater local expenditures for such services as police and fire departments since old and dilapidated buildings are more prone to fire, and overcrowded, sub-standard housing is a contributing factor to civil unrest and crime. Moreover, it should be noted that proposals for projects such as urban renewal also pose fiscal and other problems to localities; yet they need not be first submitted to a referendum.

In sum, no real justification exists in support of the discriminatory classification embodied in Article XXXIV. It is a classification whose *operation* can only serve to perpetuate present patterns of racially segregated housing while encouraging the development of similar patterns in the future. It is a classification whose *express application* imposes special burdens on the poor because of their poverty. In the absence of compelling justification, such an invidious and substantial discrimination on the bases of race *and* property constitutes a denial of equal protection of the law. *McLaughlin* v. *Florida, supra; Harper* v. *Virginia State Board of Elections, supra.*

CONCLUSION

For the foregoing reasons, the decision of the Co below that Article XXXIV of the California Consti tion is in violation of the Fourteenth Amendment the United States Constitution should be affirmed.

Dated: New York, N. Y. October 27, 1970.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of
State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

GEORGE D. ZUCKERMAN
DOMINICK J. TUMINARO
LLOYD G. MILLIKEN
Assistant Attorneys General
of Counsel